Puah Kim Yen & Ors v Maju Steel Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO 22NCC-1255–08 OF 2012
LEE SWEE SENG JC
31 JANUARY 2013

Civil Procedure — Judgment — Setting aside — Action to impeach judgments obtained and to declare them as null and void — Impeachment based on grounds of subsequent discovery of fraud and forgery — Defendant seeking to strike out plaintiff's action — Evidence which could not be retrieved during earlier trial now available — Whether fresh action to impeach original judgment proper procedure — Whether doctrine of res judicata applicable

Civil Procedure — Pleadings — Striking out — Action to impeach judgments obtained and to declare them as null and void — Impeachment based on grounds of subsequent discovery of fraud and forgery — Defendant seeking to strike out plaintiff's action — Evidence which could not be retrieved during earlier trial now available — Whether fresh action to impeach original judgment is proper procedure — Whether doctrine of res judicata applicable — Rules of Court 2012 O 18 r 19(1)

Civil Procedure — Res judicata — Principles — Action to impeach judgments obtained and to declare them as null and void — Impeachment based on grounds of subsequent discovery of fraud and forgery — Defendant seeking to strike out plaintiff's action — Evidence which could not be retrieved during earlier trial now available — Whether fresh action to impeach original judgment is proper procedure — Whether doctrine of res judicata applicable

The plaintiffs here were partners in Kim Guan Trading ('Kim Guan'). The defendant ('Maju') here had earlier commenced an action against Kim Guan in Civil Suit No D-22–1118 of 2004 ('the 2004 suit') for the balance outstanding for goods sold and delivered to Kim Guan from 1992–1993. The 2004 suit was commenced only in 2004 although the debt was a 1993 debt. To overcome the limitation period issue, Maju in the 2004 suit had alleged that there was a revival of the cause of action when Kim Guan allegedly made three cash payments between 1997–1998 of some RM3,000. Kim Guan's defence in the 2004 suit was that they had paid all outstanding amounts to Maju but that as so many years had passed since 1993, Kim Guan no longer had the relevant documents to prove the payment. Kim Guan had also led evidence in the 2004 suit that they could not have paid the three cash payments in 1997–1998

because all their payments were always by cheques. The learned judge in the 2004 suit had however entered judgment in favour of Maju. Kim Guan duly appealed and before the appeal was heard, Kim Guan managed to stumble across the documents they thought had been destroyed. The invoices would have shown that there were differences in them to show that Maju's invoices might not have been copies of the original as claimed. Even the authorised signatures of Maju had substantial differences. Maju's statements of account also did not reflect the so-called cash payments allegedly made. However Kim Guan's application in the Court of Appeal to introduce fresh evidence in the invoices, delivery orders, receipts and statements of account during the relevant periods was disallowed. Kim Guan therefore withdrew the appeal and brought this fresh suit to impeach the judgment of the High Court in the 2004 suit on grounds of fraud and suppression of material facts. Kim Guan prayed for the judgment in the 2004 suit be set aside. Maju applied under O 18 r 19(1)(b) or (d) of the Rules of Court 2012 ('ROC') and/or under the inherent powers of the court to strike out the writ and statement of claim on ground that the plaintiffs' claim was scandalous, frivolous and vexatious or otherwise an abuse of the court's process.

Held, dismissing the application with costs in the cause:

(1) The burden was always on Maju in the 2004 suit to prove its claim and even that was also on the assumption that the evidence was authentic and that there be no suppression of material evidence. It was difficult if at all possible for Kim Guan in the 2004 suit to prove a negative which was that they did not pay the three alleged cash payments (see para 24).

(2) The doctrine of res judicata had no application here as this suit was a fresh cause of action in tort and that the judgment sought to be impeached in the 2004 suit was on ground of fraud. In any event the doctrine of res judicata has its roots in equity and since the doctrine is designed to achieve justice, a court may decline to apply it where to do so would lead to an unjust result (see para 26); *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346 referred.

(3) There was now prima facie some evidence which unfortunately could not be retrieved during the trial in the 2004 suit but now fortuitously had been found and were forthcoming, the proper procedure was a fresh action to impeach the original judgment (see para 31).

(4) All that Kim Guan had to show at this stage to resist Maju's application to strike out the suit under O 18 r 19(1) of the ROC was some evidentiary basis to merit the action proceeding to trial. In other words there must be some prima facie evidence of the fraud or fraudulent suppression of material evidence that would justify the matter proceeding to trial (see paras 31–32); *Goh Hock Hai v EON Bank Bhd* [2012] 9 MLJ 656 referred.

(5) In this case there were many questions that had been raised on the nature and quality of the evidence retrieved which was not previously forthcoming and where there is some evidence that the process of the court might have been compromised in the evidence of any witness which had been less than candid or worse still calculated to camouflage the truth, the court must be constrained to allow that complaint to be heard in a fresh cause of action to impeach the judgment of the court. Maju was curiously coy concerning the distinct differences in the invoices produced by them at trial as compared and contrasted with the invoices now produced by Kim Guan. Even more disturbing was the cursory explanation proffered that the cash payments received were for 'CASH SALES' in explaining why the payments were not reflected in the statements of accounts now produced which even it be true, raised the question of how that could amount to a fresh acknowledgment of debt that would revive the limitation period to commence the action in the 2004 suit (see para 32).

[Bahasa Malaysia summary

Plaintif-plaintif di sini merupakan rakan kongsi dalam Kim Guan Trading ('Kim Guan'). Defendan ('Maju') di sini terdahulu telah memulakan tindakan terhadap Kim Guan dalam Guaman Sivil No D-22–1118 Tahun 2004 ('guaman 2004') untuk baki tertunggak untuk barang-barang yang dijual dan dihantar kepada Kim Guan dari tahun 1992–1993. Guaman 2004 telah dimulakan hanya pada 2004 meskipun hutang tersebut adalah hutang pada tahun 1993. Untuk mengatasi isu tempoh had masa, Maju dalam guaman 2004 mendakwa bahawa terdapat penghidupan kausa tindakan apabila Kim Guan telah membuat tiga bayaran tunai sedikit daripada jumlah RM3,000 antara tahun 1997–1998. Pembelaan Kim Guan dalam guaman 2004 adalah bahawa mereka telah membayar kesemua jumlah tertunggak kepada Maju tetapi setelah beberapa tahun sudah berlalu semenjak tahun 1993, Kim Guan tidak lagi mempunyai dokumen-dokumen yang relevan untuk membuktikan pembayaran. Kim Guan juga telah memberi keterangan dalam guaman 2004 bahawa mereka tidak mungkin telah membuat tiga bayaran tunai pada tahun 1997–1998 oleh kerana kesemua bayaran mereka adalah sentiasa dalam bentuk cek. Hakim yang bijaksana dalam guaman 2004 walau bagaimanapun telah memasukkan penghakiman bagi pihak Maju. Kim Guan telah membuat rayuan dan sebelum rayuan didengar, Kim Guan berjaya mendapatkan dokumen-dokumen yang disangkakan telah hilang. Invois-invois menunjukkan bahawa terdapat perbezaan di antara mereka yang mana menunjukkan invois-invois Maju mungkin bukanlah salinan asal seperti yang dikatakan. Tandatangan pihak berkuasa Maju juga terdapat perbezaan yang nyata. Penyata akaun Maju juga tidak menunjukkan bayaran tunai yang didakwa telah dilakukan. Walau bagaimanapun permohonan Kim Guan kepada Mahkamah Rayuan untuk mengemukakan keterangan baru di dalam invois-invois, permintaan untuk penghantaran, resit-resit dan penyata akaun

semasa tempoh-tempoh relevan tidak dibenarkan. Kim Guan justeru telah menarik balik rayuan dan membuat guaman baru ini untuk mencabar penghakiman Mahkamah Tinggi dalam guaman 2004 atas dasar fraud dan penindasan fakta material. Kim Guan memohon untuk penghakiman dalam guaman 2004 diketepikan. Maju telah membuat permohonan di bawah A 18 k 19(1)(b) atau (d) Kaedah-Kaedah Mahkamah 2012 ('KKM') dan/atau di bawah kuasa sedia ada mahkamah untuk membatalkan writ dan penyataan tuntutan atas dasar bahawa tuntutan plaintif-plaintif adalah bersifat skandal, remeh dan menyusahkan ataupun penyalahgunaan proses mahkamah.

Diputuskan, menolak permohonan dengan kos dalam kausa:

(1) Beban pembuktian adalah sentiasa di atas Maju dalam guaman 2004 untuk membuktikan tuntutannya dan juga atas anggapan bahawa keterangan adalah asli dan bahawa tidak terdapat penindasan keterangan material. Adalah sukar kalau tidak pun mustahil untuk Kim Guan dalam guaman 2004 untuk membuktikan ketiadaan iaitu mereka tidak membayar ketiga-tiga bayaran tunai yang didakwa (lihat perenggan 24).

(2) Doktrin res judicata tidak diguna pakai di sini memandangkan guaman ini adalah kausa tindakan yang baru dalam tort dan bahawa penghakiman yang dipohon untuk dicabar dalam guaman 2004 adalah atas dasar fraud. Dalam apa-apa kejadian doktrin res judicata berasal dari ekuiti dan memandangkan doktrin ini dicipta untuk mencapai keadilan, mahkamah boleh menolak untuk menggunakannya yang mana ia berasa dengan menggunakannya akan menyebabkan keputusan yang tidak adil (lihat perenggan 26); *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346 dirujuk.

(3) Sekarang terdapat beberapa keterangan prima facie yang mana dikesali tidak dapat diperoleh semasa perbicaraan guaman 2004 tetapi sekarang secara kebetulan telah ditemui dan bakal dikemukakan, prosedur yang wajar adalah tindakan baru untuk mencabar penghakiman asal (lihat perenggan 31).

(4) Apa yang harus ditunjukkan oleh Kim Guan pada peringkat ini adalah untuk mencabar permohonan pembatalan guaman Maju di bawah A 18 k 19(1) KKM adalah suatu asas keterangan untuk memeritkan tindakan yang bakal diteruskan dalam perbicaraan. Dalam erti kata lain mesti terdapat keterangan prima facie tentang fraud atau penindasan keterangan material secara fraud yang akan menjustifikasikan perkara yang dibawa ke perbicaraan (lihat perenggan 31–32); *Goh Hock Hai v EON Bank Bhd* [2012] 9 MLJ 656 dirujuk.

(5) Dalam kes ini terdapat banyak persoalan yang telah dibangkitkan tentang sifat dan kualiti keterangan yang diperoleh yang mana sebelumnya tidak dapat dikemukakan dan di mana terdapat beberapa

keterangan bahawa proses mahkamah mungkin telah dikompromi dalam keterangan mana-mana saksi yang tidak berterus terang atau lebih teruk cuba menyelindung perkara sebenar, mahkamah hendaklah menyekat daripada membenarkan aduan untuk didengar di dalam kausa tindakan baru untuk mencabar penghakiman mahkamah. Maju secara aneh tidak banyak bercakap berkaitan perbezaan nyata dalam invois-invois yang dikemukakan oleh mereka semasa perbicaraan berbanding dan berbeza dengan invois-invois yang sekarang dikemukakan oleh Kim Guan. Apa yang lebih menganggu adalah penjelasan ringkas yang diberikan bahawa pembayaran tunai yang diterima adalah untuk 'CASH SALES' dalam menjelaskan mengapa pembayaran tidak dinyatakan di dalam penyata akaun yang sekarang dikemukakan yang mana meskipun ia benar, menimbulkan persoalan bagaimana ia boleh membawa kepada penerimaan hutang yang baru yang mana akan menghidupkan tempoh had masa untuk memulakan tindakan dalam guaman 2004 (lihat perenggan 32).]

Notes

For cases on principles, see 2(4) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 7254–7255.

For cases on setting aside, see 2(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 4040–4714.

For cases on striking out, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 6627–6768.

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Cheah Wong Nyan and Cheah Sin Kee v Kalrm Palaniappa; Cheah Lean Guan; official assignee of the property of Cheah Lean Guan a bankrupt [1935] 1 MLJ 31; [1934] 1 LNS 10 (refd)

Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346; [2001] 2 CLJ 321, CA (refd)

Goh Hock Hai v EON Bank Bhd [2012] 9 MLJ 656; [2012] 4 CLJ 956, HC (refd)

Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143, FC (refd)

Letchumanan a/l Gopal (representative for the estate of Rajammah a/p Muthusamy, deceased) v Pacific Orient & Co Sdn Bhd [2011] 6 MLJ 788, CA (refd)

Legislation referred to

Rules of Court 2012 O 18 r 19(1), (1)(b), (d)

Sugunan Krishnan (Sugu K & Partners) for the plaintiffs.
Kala Samynathan (Alan Chua & Co) for the defendant.

Lee Swee Seng JC:

PARTIES

[1] The defendant here is Maju Steel Sdn Bhd. It was previously known as Dahong Steel Sdn Bhd. It had earlier commenced an action against both the plaintiffs herein in Civil Suit No D-22–1118 of 2004 ('the 2004 suit') for the balance outstanding for goods in the form of steel bars sold and delivered to the plaintiffs over a 2-year period from 1992–1993. The plaintiffs as defendants in the 2004 suit are partners in a partnership business called Kim Guan Trading.

PROBLEM

[2] The 2004 suit as can be seen was commenced only in 2004 when the debt was a 1993 debt. The limitation period would have set in in 1999 but as can be seen the suit was commenced only in 2004 supposedly on the ground that there was a revival of the cause of action when the plaintiffs who as defendants in the 2004 suit allegedly make some cash payments between 1997–1998 of some RM3,000. The defendant here as the plaintiff in the 2004 suit treated these payments as a fresh acknowledgment of debt and so the 2004 suit was still filed on time though very late in the day.

[3] The plaintiffs' defence in the 2004 suit as the defendants there was that they had paid all outstanding amounts to the plaintiff there who at that time was known as Dahong Steel Sdn Bhd but that as so many years had passed since 1993 that is some 11 years, they no longer have the relevant documents like cheque numbers, amount paid and receipts. They also gave evidence that they had tried hard to search for the documents before the trial in the 2004 suit but to no avail. They surmised that those documents could well have been destroyed in an exercise to prevent termites from causing further havoc to their office when old documents which they thought were no longer relevant were burnt.

[4] The plaintiffs as the defendants below also gave evidence that they could not have paid the three cash payments in 1997–1998 because all their payments were always by cheques. Without the so-called fresh acknowledgment of debt the action was barred by limitation and so they pleaded that as well.

[5] The learned judge heard the parties at trial and allowed the defendant as plaintiff in the 2004 suit to enter judgment against the defendants there. The defendants there duly appealed and before the appeal was heard, they managed to stumble across the documents they thought had been destroyed in the fire.

[6] They filed a notice of motion in the Court of Appeal to introduce fresh evidence in the invoices, delivery orders, receipts and statements of account during the relevant periods. The invoices would show that there are differences in them though subtle and slight but serious enough to show that the invoices of the defendant here might not have been copies of the original as claimed. Even the authorised signatures of Dahong Steel that were similar had substantial differences and in two of the invoices the signatures were completely different. The plaintiffs as the defendants below claim that the receipts of payments would show that there is no outstanding amounts as claimed when taken together with the remarks which the plaintiffs here claimed were written contemporaneously to reflect that the goods were rejected or discounts were given because of the damaged goods.

[7] What is particular relevant was that the statements of account of the defendants here as plaintiff in the 2004 suit did not reflect the so-called cash payments allegedly made on the three dates given in 1997–1998! The defendant here in objecting to the notice of motion explained that the cash payments were wrongly reflected as 'Cash Sales' when they were in fact not so but actually payments made towards reducing credit sales of amounts outstanding since 1993.

[8] The Court of Appeal dismissed the plaintiffs' notice of motion on ground that not to do so would open the 'flood gates'.

[9] The plaintiffs then withdrew the appeal and decided to bring a fresh action in this suit to impeach the judgment of the High Court in the 2004 suit.

PRAYERS

[10] The plaintiffs' claims are essentially under the action of impeaching the judgment of the court dated 17 March 2010 in the 2004 suit on ground of fraud and suppression of material facts. Consequentially the plaintiffs are praying that the sealed judgment of the court in the 2004 suit be set aside and that the defendant be restrained from enforcing any execution against the plaintiffs herein and also for damages for fraud and costs.

[11] The plaintiffs had set out in their statement of claim the relevant parts of the evidence given by the parties in the trial in the 2004 suit and in particular at para 11 wherein the evidence of PW2 on behalf of Maju Steel was that cash payments were made for the following sums on the following dates: RM900 on 27 October 1997, RM1,215.84 on 25 March 1998 and RM1,179.52 on 28 August 1998 which the plaintiffs had denied making payments in cash as they have always made cheque payments.

[12] The plaintiffs also disclosed the details of the invoices which carbon copies Maju Steel said it has misplaced but at trial produced copies of it which now upon examination even with the naked eyes, show differences in terms of address of the plaintiffs, the 'TERMS' as well as the signature of Maju Steel on the invoices which at paras 24–25 of the statement of claim are as follows: '… invoice no. 9201030 dated 16.6.1992, 9201112 dated 29.6.1992, 9201081 dated 23.6.1992, 9201020 dated 15.6.1992 and 9201016 dated 15.6.1992'.

[13] The plaintiffs pleaded that at para 27 they had duly made a police report against the defendant concerning the fraud. At para 33 the plaintiffs set out the particulars of fraudulent suppression of material evidence calculated to mislead the court into granting the judgment in favour of Maju Steel.

[14] The defence of Maju Steel is that all payments made by the plaintiffs in the now discovered receipts detailing the cheque payments have been taken into account and that the remarks of rejected goods and discounts given on account of damaged goods do not appear in its records. However the defendant is conspicuously and curiously coy about how the invoices are glaringly different between that exhibited by it at trial compared to the ones now recovered and retrieved by the plaintiffs. The defendant also raised the defence of res judicata in that the Court of Appeal had dismissed the motion of the plaintiffs to adduce fresh evidence and also that the plaintiffs have no cause for complaint that the defendant had suppressed the material evidence as the plaintiffs themselves have not applied for discovery.

[15] The defendant by way of encl 5 applied under O 18 r 19(1)(b) or (d) of the Rules of Court 2012 ('ROC') and/or under the inherent powers of the court to strike out the writ and statement of claim on ground that the plaintiffs' claim is scandalous, frivolous and vexatious or otherwise an abuse of the court's process and for costs.

PRINCIPLES

[16] The nub of the plaintiffs' complaint that had caused them to file this new cause of action to impeach the court's judgment given against them in the 2004 suit is two-fold:

(a) the fabrication of invoices said to be copies when they are different from the originals that the plaintiffs have now produced; and

(b) the false evidence of the fact that the plaintiffs had in 1997–1998 made three cash payments when in fact those payments are not reflected in the statement of accounts received by them and now retrieved and produced as exh PKY6 in the affidavit in reply of the plaintiff filed to oppose encl 5.

Whether the relevant invoices and the receipts of cash payments made in 1997–1998 produced by the defendant in the 2004 suit are fabricated

[17] The fact that these five invoices are different cannot be denied. A cursory inspection with one's naked eyes would show that the differences lie in the following:

(a) 'TERMS': All the five invoices in exh PKY3A (pp 51, 53, 55, 57 and 59 of the affidavit in reply of the plaintiffs) stipulates that the term is 0 days while in the five invoices in exh PKY3B (pp 62, 64, 66, 68 and 70 of the same affidavit) it is left blank;

(b) Address: There are obvious differences in the address in exh PKY3A the invoices retrieved and that in exh PKY3B that exhibited by the defendant at trial where the words 'MALAYSIA' and 'JLN SG BESI' are concerned. Also the address of the plaintiffs in two delivery orders in exh PKY3B are stated as 'B11, JALAN GEMPITA 3, SALAK SOUTH GARDEN' while in the corresponding invoices in exh PKY3B the address is stated as 'LOT 466, BT.7 1/4, JLN SG BESI'; and

(c) Signature: There are obvious differences in the authorised signature of the defendant even in the signatures that look similar and in two invoices at pp 55 and 57 corresponding to pp 66 and 68 the signatures are just poles apart.

[18] What is most uncomfortable is that the defendant is strangely silent on this allegation for which the plaintiffs had proceeded to lodge a police report. The defendant can refute the plaintiffs allegations of fabrication and say that it is the plaintiffs' invoices that are fabricated but for reasons best known to itself, it has not dared to put that in writing under oath. Neither has it made a police report that the plaintiffs have exhibited fabricated invoices. Perhaps it was a case of over-zealous officers of the company that had tried to improve on the evidence of misplaced invoices and printed out a fresh one from the computer but such an admission would mean that it is admitting to its own witness manufacturing evidence to bolster its case. If that be so then how much of the witness' evidence can the court believe when the same witness were later to say that she had signed those receipts to evidence the three cash payments received. It is the sound of silence that is deafening, screaming out for attention and explanation!

[19] The allegations of the plaintiffs are serious and the action of the defendant if true would be scurrilous. At this stage I am not prepared to say that the plaintiffs' case is doomed to fail and that it is scandalous, frivolous and

vexatious or otherwise an abuse of the court's process. In fact the reverse would be true if the allegations of the plaintiffs be found at the end of the trial to be true.

[20] What is more disturbing is the fact that the so-called three cash payments in 1997–1998 were never captured in the statements of accounts of the defendant for the relevant period as exhibited in pp 83–86 of the affidavit in reply of the plaintiffs. In fact it showed that the sum outstanding has not changed both in the statement dated 30 September 1997 through to the statement of 31 August 1998, the sum still standing the same at RM290,077.97.

[21] When confronted with this evidence in the plaintiffs' motion to adduce fresh evidence in the Court of Appeal, the defendant sought to explain away the significance and strangeness of this by saying that it was recorded as 'cash sale'. If that be true then one wonders why such an explanation was not given by the defendant's witness PW2. If in fact it was 'cash sale' then one wonders how such a payment could be a fresh acknowledgement of debt so as to revive a cause of action that had otherwise expired!

[22] Whether it is a case of a strange coincidence in a cumulative comedy of errors or a more sinister strategy of 'cooking up' documents and payments to as it were indirectly reviving a cause of action that had lapsed because of limitation, is a matter that can and should be determined at the trial of this suit. Suffice to say that at this stage there are more questions raised than there are satisfying answers to those questions.

[23] The allegations of the plaintiffs are not unsubstantiated. If at the end of the day, the evidence recovered and retrieved which the plaintiffs say show fabrication and suppression of evidence on the part of the defendant, cannot stand the test of curial scrutiny then the plaintiffs and if need be their solicitors can be mulct with costs.

[24] The defendant now says that the plaintiff had no cause for complaint because it had failed to apply for discovery of the relevant documents that they did not have from the defendant here as the plaintiffs in the 2004 suit. In the light of the revelation from the recovered documents retrieved, that argument appears more of an excuse rather than an explanation. Surely the overriding principle must be that the burden is always on the plaintiff there in the 2004 suit to prove its claim and even that is also on the assumption that the evidence is authentic and that there be no suppression of material evidence. It is of course difficult if at all possible for the plaintiffs as the defendants in the 2004 suit to prove a negative which is that they did not pay the three alleged cash payments.

[25] Yet another objection raised by Maju Steel is that the plaintiffs' in their defence had objected to only one of the three cash payments but such an objection should not present an obstacle to the plaintiffs to oppose Maju Steel's allegations as in the first place Maju Steel in its statement of claim in the 2004 suit had not descended into detailing how many and how much cash payments were made and when other than stating that payments were made from time to time and the last payment was made on 28 August 1998. It was in that context of traversing a vague averment that the defendants asserted that they did not make the so-called last payment on 28 August 1998. At any rate when evidence was given by the defendants in the 2004 suit on the non-payments of the alleged cash payments in 1997–1998, no objection was taken and Maju Steel had every opportunity to cross-examine the defendants on this at the trial.

Whether res judicata applies such that having failed to introduce fresh evidence in the motion before the Court of Appeal the plaintiffs are precluded from commencing a fresh tort action to impeach the judgment of court in the 2004 suit

[26] The defendant in both its defence and in its various affidavits in support of its application to strike out the plaintiff's writ and statement of claim appear to be majoring on the defence of res judicata. Much of its submission by learned counsel Miss S Kala was on the fact that the doctrine of res judicata would apply as a complete answer to the plaintiff's claim. Mr K Sugunan's reply is that the doctrine of res judicata has no application here as this suit is a fresh cause of action in tort and that the judgment sought to be impeached in the 2004 suit is on ground of fraud. In any event the doctrine of res judicata has its roots in equity and since the doctrine is designed to achieve justice, a court may decline to apply it where to do so would lead to an unjust result.

[27] I must express my full agreement with Mr K Sugunan's proposition above. As authority Mr K Sugunan cited the case of *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346 at pp 356–358; [2001] 2 CLJ 321 at pp 331–333 where His Lordship Gopal Sri Ram JCA (as he then was) sketched a brief history of the development of the doctrine of res judicata and the way it has been applied appropriately to achieve justice:

> Now, res judicata is not merely a technical rule of pleading. It is a doctrine of substantial justice. It is a process whereby justice is achieved procedurally by precluding a party from re-agitating in subsequent proceedings a complaint or an issue that has, or could fairly have, been disposed in earlier proceedings between the same parties or their privies. It is merely equity in action in the procedural arena. It is sometimes referred to as the rule in *Henderson v Henderson* (1843) 67 ER 313. In that case, Wigram VC said:
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> > In trying this question I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties

> to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

The doctrine may thus be seen to encompass several categories. In its narrowest sense, res judicata, I think, refers to estoppel by record. It refers to the actual decision in the earlier action or proceeding. In its wider sense, it encompasses issues, and causes of action that could justly and fairly have been equally adjudicated in the earlier suit or proceeding. This wider operation of the doctrine is sometimes referred to 'constructive res judicata'. It houses the twin concepts of issue estoppel and cause of action estoppel. Like the tree of which they form the branches, they are designed to ensure that there is finality in litigation.

Pausing for a moment, I think that it is essential to bear in mind that Wigram V-C spoke these words in the Court of Chancery and that the court he referred to was that court, of which he was the vice-chancellor at the time. I make mention of these matters in order to demonstrate that the doctrine of res judicata has its roots in equity and hence retains its discretionary nature that is common to all equitable doctrines.

Now, there is a dimension to the doctrine of res judicata that is not always appreciated. It is this. Since the doctrine (whether in its narrow or broader sense) is designed to achieve justice, a court may decline to apply it where to do so would lead to an unjust result. And there is respectable authority in support of the view I have just expressed.

In *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd and Others (No 2)* [1966] 2 All ER 532 at p 573, Lord Upjohn said:

> As my noble and learned friend, Lord Reid, has already pointed out there may be many reasons why a litigant in the earlier litigation has not pressed or may even for good reasons have abandoned a particular issue. It may be most unjust to hold him precluded from raising that issue in subsequent litigation (and see Lord Maugham LC's observations in the *New Brunswick* case ([1938] 4 All ER at p 755; [1939] AC at p 21)). *All estoppels are not odious but must be applied so as to work justice and not injustice, and I think that the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind*. (Emphasis added.)

In *Arnold v National Westminster Bank Plc* [1991] 2 AC 93 at p 109, Lord Keith of Kinkel expressed the following view:

> In my opinion Your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a

> point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. *One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result*, as was observed by Lord Upjohn in the passage which I have quoted above from his speech in the *Carl-Zeiss* case [1966] 2 All ER 536 at p 573, [1967] 1 AC 853 at p 947. (Emphasis added.)

In a later passage, I find Lord Keith saying:

> Estoppel per *rem judicatam*, whether cause of action estoppel or issue estoppel, is essentially concerned with preventing abuse of process. In the present case I consider that abuse of process would be favoured rather than prevented by refusing the respondents permission to reopen the disputed issue.

These views were very recently reaffirmed by the House of Lords in *Johnson v Gore Wood & Co* (2000) (Unreported, speeches published on 14 December 2000). See, in particular the speech of Lord Bingham of Cornhill, at pp 8–10 of the transcript.

On the authorities discussed thus far, the principle comes to this. *Whether res judicata in the wider sense should be permitted to bar a claim is a matter that is to be determined on the facts of each case, always having regard to where the justice of the individual and particular case lies*. (Emphasis added.)

[28] While the motion to adduce further evidence on appeal is purely procedural, the current action is substantive as in an action to impeach a judgment of court obtained by fraud or fraudulent suppression of material evidence. Indeed the two are distinctly different. The case of *Cheah Wong Nyan and Cheah Sin Kee v Kalrm Palaniappa; Cheah Lean Guan; official assignee of the property of Cheah Lean Guan a bankrupt* [1935] 1 MLJ 31; [1934] 1 LNS 10 explains the jurisdiction of the court to set aside a judgment obtained by fraud in this way:

> The court undoubtedly has jurisdiction to set aside a judgment obtained by fraud in a subsequent action brought for that purpose, the proper remedy being an original action and not a rehearing. *Cole v Langford* [1898] 2 QB 36 and *Priestman v Thomas* (1884) 9 PD 210 …
>
> One of the earliest pronouncements of this principle was made by Lord Coke in the *Duchess of Kingston*'s case, (1776) 2 Sm LC (12th Ed), at p 762 where he observed that acts of the highest judicial authority though not to be impeached from within yet are impeachable from without for although it is not permitted to show that the court was mistaken it may be shown that they were misled. 'Fraud is an intrinsic collateral act which vitiates the most solemn proceedings of Courts of justice. It avoids all judicial acts, ecclesiastical or temporal'.

[29] The Federal Court has held in *Hock Hua Bank v Sahari Bin Murid* [1981] 1 MLJ 143 at p 144 that:

… But if a judgment or order has been obtained by fraud or whether further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment: *Hip Foong Ong v Neotia & Co* [1918] AC 888 and *Jonesco v Beard* [1930] AC 298. The hearing of the action will in a proper case be expedited: *Smith v Peizer* 65 SJ 607.

[30] The same approach was taken by the Court of Appeal in *Letchumanan a/l Gopal (representative for the estate of Rajammah a/p Muthusamy, deceased) v Pacific Orient & Co Sdn Bhd* [2011] 6 MLJ 788 in the context of an objection raised on res judicata. It was observed by His Lordship Abdul Hamid Embong JCA (as he then was) at p 796 as follows:

[20] *It is our view that the liability and recovery actions are distinct from each other*. The former is a claim founded on tort whereas the latter is based on a statutory right provided under the provisions of the RTA. For this reason alone it would be unjust to bar the insurers from raising afresh the issue of its liability even to the extent of adducing evidence on the same issue at the recovery action stage.

[21] In the liability action, the issue before the court would be to determine negligence whereas in the recovery action the issues include the construction of the terms in the insurance policy and the application of ss 91 and 96 of the RTA. It is upon this construction of the insurance policy that the insurers raised for the first time in the recovery action. In this appeal, P&O, as the insurers is thus seeking to declare that the policy as against the deceased, is unenforceable due to the exception in its terms. This issue remains alive and was brought up on appeal to the High Court and now before us.

[22] It needs to be mentioned that P&O was not a party in the liability action. Thus, a final determination of this issue cannot be said to have been made by the trial judge in the liability action. *A dogmatic approach applying the res judicata principle as a bar would be most unjust to P&O who does not have a full and fair opportunity to litigate the issue. This factor must be met before res judicata can be binding on the parties. It is founded on justice and common sense*. (Emphasis added.)

[31] As can be seen in our case as there is now prima facie some evidence which unfortunately could not be retrieved during the trial in the 2004 suit but now fortuitously have been found and are forthcoming, the proper procedure is a fresh action to impeach the original judgment.

The test to be applied in a striking out action under O 18 r 19(1) of the Rules of Court 2012

[32] All that the plaintiffs have to show at this stage to resist the defendant's application to strike out the suit under O 18 r 19(1) of the ROC is some

A evidentiary basis to merit the action proceeding to trial. As was stated in *Goh Hock Hai v EON Bank Bhd* [2012] 9 MLJ 656 at p 664; [2012] 4 CLJ 956 at pp 964–965 where His Lordship Varghese George J observed as follows:

> [14] I could not agree with counsel for the plaintiff that just because he was now crying 'fraud' or 'forgery', the plaintiff was entitled to a full trial to impeach the judgment duly entered in the 2001 suit in favour of the defendant.
>
> It was my view that when challenged by the defendant in this application to strike out the action, the plaintiff had the further obligation *to show, that there was some evidentiary basis, to merit the action to be remitted for a full trial to establish that alleged 'deliberate fraud' practiced by the defendant on the court*. (Emphasis added.)

[33] In other words there must be some prima facie evidence of the fraud or fraudulent suppression of material evidence that would justify the matter proceeding to trial. In this case there are many questions that have been raised on the nature and quality of the evidence retrieved which was not previously forthcoming and where there is some evidence that the process of the court might have been compromised in the evidence of any witness which has been less than candid or worse still calculated to camouflage the truth, the court must be constrained to allow that complaint to be heard in a fresh cause of action to impeach the judgment of the court. As I have observed before the defendant has been curiously coy concerning the distinct differences in the invoices produced by them at trial as compared and contrasted with the invoices now produced by the plaintiffs. Even more disturbing is the cursory explanation proffered that the cash payments received were for 'CASH SALES' which explains why the payments were not reflected in the statements of accounts now produced which even it be true, raises the question of how that could amount to a fresh acknowledgment of debt that would revive the limitation period to commence the action in the 2004 suit.

[34] I am mindful of the principles laid down for an application of this nature in the Supreme Court's decision of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 at pp 43–44 where it was distilled for us as follows:

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the Rules of the High Court are well settled. It is only in *plain and obvious cases* that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck v Wilkinson* [1899] 1 QB 86 at p 91), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it '*obviously unsustainable*' (*Attorney-General of Duchy of Lancaster v L&NW Ry Co* [1892] 3 Ch 274 (CA)). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (*Wenlock v Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871 (CA)). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the

point set down for argument under O 33 r 3 (which is in para materia with our O 33 r 2 of the Rules of the High Court) (*Hubbuck v Wilkinson*). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable …

It has been said that so long as the pleadings disclose some cause of action or raise some question fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out (*Moore v Lawson* (1915) 31 TLR 418 (CA) and *Wenlock v Moloney* [1965] 1 WLR 1238.) (Emphasis added.)

PRONOUNCEMENT

[35] In the circumstance I had dismissed the application in strike out in encl 5 with costs in the cause. In line with the Federal Court's advice in *Hock Hua Bank Bhd v Sahari Bin Murid* I had fixed an early trial on 4 April 2013 hardly four months away.

Application dismissed with costs in the cause.

Reported by Kanesh Sundrum